

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

76-6122

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COUNTY OF SUFFOLK, COUNTY OF NASSAU, et al.,

Appellees,

-against-

SECRETARY OF THE INTERIOR, et al.,

Appellants.

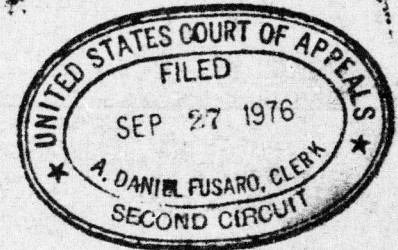
THE STATE OF NEW YORK and THE NATURAL RESOURCES
DEFENSE COUNCIL, INC.,

Appellees,

-against-

THOMAS S. KLEPPE, Secretary of the Interior,

Appellant.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE STATE OF NEW YORK

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Statement

This brief is submitted by plaintiff-appellee the State of New York in response to the briefs of appellants, the Secretary of the Interior ("Secretary"), National Ocean Industries Association ("NOIA") and the New York Gas Group ("NYGAS").

It is the State's position that the order below, preliminarily enjoining the Secretary from holding Lease Sale 40 in the Mid-Atlantic Outer Continental Shelf, was correct both for the reasons set forth in the District Court's decision and for other reasons not relied upon by that court but argued below. Prior decisions of this and other Circuits required injunctive relief in light of the evident violations of law by the Secretary.

On August 16, 1976 a panel of this Court, finding that no irreparable harm to plaintiffs would occur before this appeal was argued, stayed the preliminary injunction, permitting Sale 40 to take place. During argument, however, the judge presiding said that this Court, if it later affirmed,

could order the cancellation of that sale, and that oil companies bidding at Sale 40 would be doing so with knowledge that the sale could be invalidated after the appeal was argued. Indeed, Mr. Justice Marshall, in declining to vacate the stay, apparently agreed that this Court had the power, upon affirming, "to declare the leases invalid." (A 217).^{*} We accordingly are asking this Court to affirm the decision below, and to annul Sale 40 and the acceptance of any bids made at the sale and enjoin and annul any leases thereunder.

Issues Presented For Review

1. Was the Sale 40 EIS legally inadequate for the reasons relied upon by the District Court's opinion, i.e., that it failed to consider meaningfully the possible effects of a Federal-State confrontation resulting from the Secretary's attempt to force the OCS leasing programs upon unwilling States?

^{*}Page references preceded by an "A" refer to pages in the Appendix. The Final Environmental Statement for O.C.S. Sale No. 40, separately filed with this Court, is cited as "Sale 40 EIS", while the Final Environmental Statement, Proposed Increase in Oil and Gas Leasing on the Outer Continental Shelf, also separately filed with the Court, is cited as "Programmatic EIS." Pages in the transcript of the hearing below are denoted "Tr."

2. Was Sale 40 illegal and the injunction properly granted for additional reasons argued below but not adopted by the District Court?

Counter-Statement of Facts

Pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq., the Secretary of the Interior is authorized, under certain circumstances, to sell oil and gas leases on the nation's Outer Continental Shelf ("OCS"). Such sales commenced during the 1950's, and were held primarily in the Gulf of Mexico. However, in April 1973 President Nixon directed the Secretary to greatly accelerate the leasing program, which direction resulted in consideration as well of new, or frontier, OCS areas, in the Pacific and Atlantic Oceans.

The Secretary, recognizing that national accelerated OCS leasing required compliance with NEPA, had an environmental impact statement prepared subsequently (Programmatic EIS), and on September 29, 1975 he purportedly "decided" to adopt the program, as directed by the President.

Upon "adoption" of the national program, the Interior Department held two lease sales in the Pacific OCS but no sale in the Atlantic was held prior to Sale 40, on August 17, 1976. The Pacific sales were off the coasts, respectively, of California and Alaska and those States sued to enjoin the sales. The present action was brought to enjoin Sale 40.

After Sale 40 five other Atlantic OCS sales are proposed over the next two years. The Secretary proposes to hold a second Mid-Atlantic sale as well as two sales each in the North Atlantic and South Atlantic (A 1005). The State of New York, being located next to both the Mid-and North-Atlantic sites, (Programmatic EIS, Vol. I, p. 5), is thus likely to be impacted by four sales held over a 2-year period.

While the Court below purported to deny a "preliminary injunction preventing all future OCS leasing" (A 88), that issue was not before it. The motion for a preliminary injunction (Document 4 in Index on Appeal in State of New York v. Kleppe) sought a preliminary injunction barring only Sale 40, the only imminent sale, and action in furtherance or preparation for it. A permanent injunction against the national program was sought in the complaint, but that was not part of the motion.

ARGUMENT

I. THE SALE 40 EIS WAS AN INADEQUATE EIS UNDER NEPA FOR THE REASONS RELIED UPON BY THE DISTRICT COURT.

The Sale 40 EIS and related documents were inadequate under NEPA in that they did not adequately inform the Secretary, the President, the Congress, other governmental bodies and the public that state and local regulatory power could alter the Interior Department's assumptions about the environmental impact of oil and gas related operations resulting from the scheduled lease sale. Those documents concluded that transportation of oil by pipeline was environmentally much safer than by tanker (See, e.g. Programmatic EIS, Vol. II, p. 40; Sale 40 EIS, Vol. II, p. 183) and assumed that pipelines would be used. However, as the court below found (A 73), contrary to this assumption state and local regulatory power could bar pipelines and other on-shore facilities. The barring of pipelines could result in tankers being used to transport oil from off-shore platforms to shore. Thus, the EIS seriously understated the potential environmental impact of the lease sale.

Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), requires, inter alia, that all federal agencies shall include in every recommendation or report on a major federal action significantly affecting the quality of the human environment a detailed statement by the responsible official regarding the environmental impacts of the proposed action. Courts frequently have held that final environmental statements were invalid because they were not sufficiently detailed concerning the environmental effects of the action. Chelsea Neighborhood Associations v. U.S. Postal Service, 516 F. 2d 378 (2nd Cir. 1975) (per Feinberg, D.J.); Silva v. Lynn, 482 F. 2d 1282 (1st Cir. 1973); Environmental Defense Fund v. TVA, 339 F. Supp. 806 (E.D. Tenn. 1972), aff'd., 468 F. 2d 1164 (6th Cir. 1972).

For example in the Chelsea Neighborhood case, this Court affirmed District Judge Ward's grant of a preliminary injunction preventing the Postal Service from contracting for or proceeding with the construction of a garage because an inadequate environmental statement had been filed. The Postal Service contemplated that air rights would be granted to the City of New York for public housing to be built atop the garage.

This Court held that the environmental statement was inadequate, inter alia, because it did not contain a "comprehensive analysis of the environmental impact of the housing" based on an interdisciplinary approach. 516 F. 2d at 387-89. The Court criticized the treatment of environmental impacts in some detail, not only regarding physical impacts, such as effects on traffic and garbage collections, but also regarding human impacts, such as the emotional effect of living on an 80 foot plateau and the effect of isolation on the crime rate. 516 F. 2d at 387-88. The Court rejected the Postal Service's claim that since the housing portion of the project was speculative it would not be required to "assess the unknowable" 516 F. 2d at 388.

In this connection the District of Columbia Circuit has stated:

"It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to

shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'" Scientists Institute for Public Information v. AEC, 481 F. 2d 1079, 1092 (D.C. Cir. 1973): Accord, City of Davis v. Coleman, 521 F. 2d 661, 677 (9th Cir. 1975).

Appellants claim, however, that the Mid-Atlantic States should support Sale 40 because it will bring them oil and gas, which they are said to badly need, and that a refusal to allow pipelines or other on-shore facilities is therefore most unlikely. Herein lies the very sort of callousness and myopia which the District Court noted in its decision. In point of fact, no matter how much the Secretary and the oil industry may tout the accelerated OCS program and sales in frontier areas, it is evident that the affected States do not share this view, and do not want OCS sales off their coasts.

Sales in frontier areas of the OCS have taken place so far off Alaska, California and in the Mid-Atlantic, and each of those sales was opposed. As the cases cited on p. 6(fn) of the Secretary's brief show, both Alaska and California, as well as the Southern California Association of Governments, brought suit to enjoin recent OCS sales off

their coasts.* The State of New York as well as the Counties of Suffolk and Nassau and towns located in those Counties have sued to enjoin Sale 40. If these suits prove nothing else, they prove that there is pervasive hostility by the affected States towards the program.

Moreover, in commenting on the draft Programmatic EIS in early 1975, not only New York but each of the Mid-Atlantic States expressed major reservations and skepticism about the accelerated OCS program, thus indicating a possible refusal to allow on-shore sitings. The Commonwealth of Virginia, for example, argued that energy conservation "could forestall the necessity to tap new energy sources" (id. at 987), and its detailed comments focused very specifically on the adverse impacts pipelines

*On pages 18-19 of its brief, NOIA reaches beyond the record to argue that neither California nor Alaska said in their suits that they would bar pipelines. As to Alaska, the Government's attorney, Mr. Jensen, conceded below that pipelines will not be used there (Tr. 2771). As to California, its filing of suit to enjoin the sale is ample proof that it might refuse to assist the oil companies when the time comes for building the pipelines. And, the Government's attorney has admitted that one community or regional group in California has already barred pipelines (Tr. 2772).

would have on beaches and other coastal areas (id. at 991-992, Statements 1, 2, 7 and 9). New Jersey was also critical of the accelerated program, calling it a "knee-jerk decision" which would not achieve energy self-sufficiency (id. at 904). The State of Delaware said that the "ill-defined but massive action proposed would result in similarly ill-defined but massive consequences which, lacking further information, must be regarded as seriously negative" (id. at 715). And the State of Maryland pointed out that the on-shore and socio-economic impacts of the program would be "profound" (id. at 756). Suffolk and Nassau Counties meanwhile filed their suit in February 1975 seeking to enjoin the program.

In short, the unhappiness of the Mid-Atlantic States with the national program was expressed one and a half years ago and has been repeated frequently. The Secretary and oil industry, however, closed their ears to these protests, and closed their ears again when these states commented on the draft Sale 40 EIS early in 1976.

If the Secretary persists in holding these sales despite public opposition, he must be prepared for the possibility that the States will resist the program in any way they can, and may refuse to allow pipelines or other on-shore facilities on their land. Indeed, Cape May County, a coastal county in southern New Jersey, has already asked the Secretary "to withhold" Sale 40, and has advised him that it will resist attempts to locate on-shore facilities in that county (A 681). Since this county is so conveniently located to many of the existing Sale 40 tracts, it would be a logical point to which pipelines would be run and gas processing and other on-shore facilities built. Its expressed intention to resist development plans could itself jeopardize the Secretary's intention to use pipelines and could undermine the oil industry's desire to exploit Sale 40 oil and gas rapidly. Moreover, as conceded by appellant NYGAS (brief, p. 12 fn), this State and others raised the issue relied on in the decision below when they commented on the draft Sale 40 EIS early in 1976.

In comments printed in the Sale 40 EIS, Volume III, p. 224, the State of New York said: "If approval cannot be obtained from the States for pipelines, the impact of tankering must be considered more carefully." And the New York State Attorney General's office, in separate comments, noted some of the problems associated with pipelines, and criticized the draft's flat assumption that pipelines would be used without even considering when their use might be impossible (id. at pp. 192-3). Moreover, those same comments called for cancellation of Sale 40 and revocation of the national program (id. at 209).

In addition, Cape May County, New Jersey, stated at a public hearing on the draft impact statement that Sale 40 should not be held and that the County would continue to resist OCS activities "to the fullest extent possible" (A 680-681). And the State of New Jersey stated clearly in its comments that it was "evaluating whether oil or gas pipelines crossing the Atlantic Coast beaches will pose unacceptable risks" and said that the sale in its present form should not be held (Sale 40 EIS, Volume III, pp. 242-3).

In short, the issue of confrontation with the Mid-Atlantic States on this issue was squarely raised by the States' comments, and there is no excuse for the Interior Department's failure to treat the issue adequately in the Sale 40 EIS or for appellants' pretense of having been surprised to hear that a possible conflict with the States exists.

Appellants argue, however, that even if pipelines are not permitted in some of the coastal areas, they will be allowed in others. For one thing, that cannot be lightly assumed, in view of the reservations expressed by all of the Mid-Atlantic states about the program. Moreover, even if pipelines and onshore facilities are barred from only certain areas, and if they would be permitted elsewhere, the result might be to require many additional miles of pipelines which could only be built at great cost. That added cost, \$1 million per mile (A. 417; Tr. 2464), might render the pipelines economically unfeasible, in which case tankers would have to be used.*

The likelihood of a conflict with the States is reflected not only by their expressed opposition to the accelerated OCS program, but also by their existing statutes which restrict or bar precisely the sort of onshore

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* Similarly NOIA misses the point when it complains that the State of New York did not prove that pipelines were expected to be run to the State of New York. In fact, the EIS itself does not state where pipelines would run, and does not exclude New York. Moreover, prohibitions of pipelines by other States, as suggested by the evidence, could make New York a desirable locus for pipelines. Indeed, at p. 17 of the post-hearing memorandum below (Document 66 in Index or Appeal in County of Suffolk v. Dept. of Interior, appellant NYGAS specifically noted this possibility.

activities contemplated by appellants. The court below compiled a 120-page appendix detailing some of the relevant statutes in the Mid-Atlantic States (A. 90-209). A careful review of those statutes would have revealed the serious likelihood of conflict. The Secretary's contention (Brief, p. 19) that a 5-page discussion of this topic in the Sale 40 EIS was adequate shows just how indifferent the Secretary is to these state laws. Indeed that 5-page discussion of the possible role of State laws in mitigating environmental harm (Volume II, pp. 426-430) fails to focus on the federal-state conflict here at issue. Moreover, it hardly begins to discuss the panoply of state law set out in the district court's appendix.

Appellants say that the injunction below was granted on an issue which was not raised by the district judge until the close of the hearings on August 6, 1976. This claim is blatantly incorrect.

For one thing, the district judge discussed the argument that was later the basis for his order as early as July 28, 1976, the fourth day of the hearing, while plaintiffs were presenting their case. He then said:

"...this is a hypothetical -- to indicate the problem, all of the states say no pipelines may be landed, then they are going to have to go to tankers and the effect on pollution may be substantial, which may require reconsideration of the whole problem of the effect on the environment."
(A. 423-424).

Thus, appellants were on notice of the importance of this issue from the early part of the hearing, and had ample opportunity to address it when they began putting on their witnesses one week later, on August 4, 1976. In fact, the issue did come up again during the testimony of appellant NOIA's witness William Wenstrom. That witness testified that the Sale 40 EIS contained a definite assumption that pipelines would be used (Tr. 2420)*

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* The Secretary concedes as much (Brief, p. 17).

and the following colloquy ensued:

"THE COURT: Supposing New Jersey and Maryland decide no pipeline should be landed?

THE WITNESS: Then I suppose New Jersey and Maryland and the off-shore production industry have a problem.

But I think that that would be an entirely unrealistic and in fact an extreme position to take, because I don't think pipeline landfalls are incompatible with every square mile of -- of the ocean front of any of those states.

THE COURT: Well, that's a state decision, isn't it, now?

THE WITNESS: I would hope that it's a state decision, that the states would have the authority to exercise that kind of control over their own -- their own beachfront, yes, sir.

THE COURT: So if they decide no landing in any place that's economically feasible there is a problem, isn't there?

THE WITNESS: Yes, sir, but that -- that kind of a decision is not solely an economic -- or an environmental decision, in my estimation. It's partly a political decision.

THE COURT: Yes, but it's a political decision by the states, isn't it?

THE WITNESS: Yes, sir, it is. And it should be made, that kind of a decision should be made by the states. They have to take a -- a position in my view on that -- on that very decision." (Tr. 2422-23) (Supplemental Appendix 51-2)

The issue was addressed again during the Federal Government's cross-examination of Wenstrom, when the following exchange occurred:

"Q. Okay. Well, if the state along the coast refused to allow pipelines to go through their limit of the continental shelf, the three-mile limit, or onshore, are there other alternatives available to oil companies to bring that oil ashore?

A. Well, when you come right down to it there are only two means of transporting oil from offshore to onshore: pipelines; the second to utilize some type of vessel, either a barge or a tanker. Not using pipelines of course would require the oil industry to a greater degree to rely on tanker or barge traffic." (Tr. 2425) (Supplemental Appendix 54)

So far as appellants' claim that the issue relied on by Judge Weinstein was not referred to in the testimony at the hearing, the fact is that it was raised during the testimony of witnesses other than Wenstrom.

Professor James Mitchell of Rutgers University testified on plaintiffs' behalf that "[i]f New Jersey denies permission to bring pipelines ashore, they can't bring them ashore" (A. 418-419). Professor Mitchell also testified that the laying of pipelines in New Jersey could create major disruptions which might preclude their use and require that tankers be used instead (A. 342-347, 393, 459-461). Moreover, Professor Mitchell testified that pipelines required permission from the affected states (A. 417) and he alluded to potential conflicts between state coastal laws and the onshore siting of OCS-related facilities (A. 335, 433). There was similarly testimony that local communities are in general not receptive to refineries (A. 355-6) and testimony by the Director of Planning for Cape May County, New Jersey, Mr. Jarmer, that Cape May County was expressly opposed to them and would oppose OCS onshore development (A. 681-2). In fact, the entire testimony of Professor Mitchell (Tr. 426-892) and Mr. Jarmer (Tr. 1569-1610), aggregating over 500 pages, focused on the potential conflict between the state's land use plans and the needs of OCS development.

Of special interest in this regard was Professor Mitchell's testimony concerning New Jersey's water situation. He testified that necessary OCS on-shore facilities, such as petrochemical plants, refineries, gas processing plants and pipe coating plants used large quantities of water, millions of gallons a day (A. 331, 352, 354, 365), but the State already has water shortage problems and projects a large water deficit in the future (A. 380). This fact could further indicate a future curb on onshore facilities.

Moreover, there was substantial testimony concerning problems with pipelines, from which it could be readily inferred that, even if overall pipelines are safer than tankers, states might seek to exclude them. Tanker routes could be such that tankers might constitute a lesser threat to a particular state than a pipeline on its shores. Professor Jerome Milgram of M.I.T. testified at some length about possible pipeline accidents which could result in oil spills (A. 220-222, 230-231), and said that even with existing pipeline

inspection procedures a spill of 1,000,000 gallons of oil was possible (A. 223-225). It was also brought out that such near shore oil spills could be devastating to wetlands and marine life (A. 267-271) and could ruin the economies of coastal areas dependent on the tourist trade (A. 373-4). In addition, there was testimony by Professor Joseph Rachlin that burial of pipelines, as would generally be required of oil and gas lessees, would itself have toxic effects on marine life and particularly wetlands (A. 258-265).

In light of this testimony, it would not be inconsistent for a state to say that if there must be a Sale 40, it should use pipelines, because the EIS claims they are safer on the whole than tankers, but that the state is opposed to Sale 40 and will bar or sharply curtail the placement of pipelines or onshore facilities within its jurisdiction.

Finally, contrary to appellants' claim, the issue relied on by the district court was discussed in legal memoranda by plaintiffs below. The disruptions to coastal states caused by pipelines are discussed at

pp. 21 and 45-46 of the memorandum in support of the motion for a preliminary injunction by the State and NRDC (Document 8 in Index on Appeal in State of New York v. Kleppe); the negative impact of refineries was discussed at p. 24 of that memorandum. And the State, in its post-hearing memorandum (Document 22 in Index on Appeal), at pages 74 and 78, raised the issue that the effect of objections by states to pipelines might be to upset an assumption underlying the EIS.

Appellants were very aware of the issue involved here even before the district court discussed it once again after the close of testimony (A. 810-811). In response to the court's concern, some of the appellants extensively briefed the question of the treatment in the EIS of the effects of state action barring pipelines in their post-trial memoranda, citing many pages of the Sale 40 EIS to show that the issue was considered, as they now cite such pages to this Court. Moreover, both NOIA and the Government gave their citations to the district court

at the oral argument on August 11, 1976, and the Judge said he would review the citations again (A. 821-825; 827; 830; 831; 832-835; 836).

The Court indicated that the question before it was whether the impact statement taken as a whole gave a realistic assessment of the issue. It said that "you can't take a set of documents that are six feet high and just slip in an occasional word here or there and say, this covers it" (A. 830).

It is plain, then, that the citations relied on now by appellants were known to the district court. The court, however, was also familiar with the impact statement in its entirety. In its decision, it noted that the Sale 40 EIS mentioned the possibility that tankers would be used, but said that the document taken as a whole relied heavily on the assumption that pipelines would in fact be used (A. 66-73).*

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* The assumption that pipelines would be used and could be decided upon by the Federal Government alone truly pervades the Sale 40 EIS and appears at many pages in addition to those cited in the opinion below, including Volume II, pp. 124, 134, 141-5, 161, 284-6, 292, 295-6, 302-3, 319-20, 446-8, Volume III, pp. 530-538. In fact, as already noted, the Secretary's brief (p. 17) and NOIA's witness Dr. Wenstrom (Tr. 2420) both acknowledge that this assumption appears in the EIS.

Each of appellants' briefs now again points to portions of the Sale 40 EIS which allegedly mention not the basic issue of the potential opposition of the Mid-Atlantic states to the OCS program, but their power to control pipeline landings. It is submitted, however, that the district court correctly rejected the citations. Many of them merely say that tankers might have to be used, but do not relate that possibility to state opposition -- and they apparently relate instead to situations where pipelines are unfeasible for technological or economic reasons. Other portions of the Sale 40 EIS point out that the states have jurisdiction over their territory and must give approval for pipeline landings, but these sections do not consider the serious likelihood of state refusal; they rather assume that upon proper application approval will be obtained, if not for one site than for another suitable site (see, for example, Sale 40 EIS, Volume II, p. 456; Volume III, p. 64, relied upon by appellants).

Among all the citations in appellants' briefs, however, only two appear to raise directly the issue of a state refusal to allow pipelines. One reference was quoted in the district court's decision (A. 71), in which the EIS lists "if rights-of-way are denied in State waters" as a reason why tankers may be needed -- apart from technical or economic non-feasibility. The other reference is in a footnote in Volume II, p. 20, where it is said that pipelines could be hindered or prohibited depending on the "receptivity of State and local jurisdictions along Mid-Atlantic coast to the approval of pipeline landfalls that would be needed."*

Are these two sentences buried in a 4-volume EIS, comprising some 2,000 pages, sufficient to put the reader on notice of the serious possibility that the Mid-Atlantic coastal states will say no?

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* This footnote is incorrectly quoted at p. 19 of the Secretary's brief.

But, appellants ask, what should the Sale 40 EIS have said about the issue? We submit that it should have discussed the opposition to the program already expressed by the affected states and should also have analyzed in some detail the state laws set out in the appendix to the district court's decision (A. 90-209). It also should have considered what the result of a state ban on pipelines would be.

For example, the benefit of Sale 40, we are told, is that it may make oil and natural gas discoveries possible (Sale 40 EIS, Vol. I, p. 3). Indeed, there is some testimony that more natural gas than oil is likely to be found (Tr. 2297), and appellants repeatedly argue that the nation needs this oil and natural gas. The EIS assumes that the oil and gas will be piped to shore, but if pipelines can't be landed what happens? The EIS states that the oil, a liquid, can be tankered ashore, but does not say what would become of the natural gas, which cannot be tankered because of its physical characteristics. This fact is confirmed in the Secretary's

Programmatic EIS, Vol. I, p. 60, which says:

"Oil produced on the OCS can be moved ashore either by a tank vessel (barge or ship) or pipeline; gas, of course, can only be sent ashore by pipeline." (Emphasis added)

It would therefore appear that a state bar of pipelines, while it would make oil operations more difficult and environmentally far more hazardous, might make it totally impossible to exploit the natural gas.* If it was anticipated that more natural gas than oil would be found and that this gas would be a benefit which the nation was to receive, this scenario certainly should have been developed and explored in the EIS, as it could require a rethinking of the desirability of pressing ahead with Sale 40 in the face of State opposition. Indeed, a balancing of economic benefits of the Sale against environmental costs is required by NEPA, Chelsea Neighborhood, supra, 516 F. 2d at 386-387; NRDC v. Morton, 458 F. 2d 827, 833 (D.C. Cir. 1972). The

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* The attorney for NYGAS conceded in the district court that a state bar against pipelines would probably apply to gas pipelines as well as oil pipelines (Tr. 2803-04). Indeed, the physical incursion would be the same in either case (Tr. 2806).

possibility that the benefits may be less than those anticipated certainly requires a reassessment of the costs and benefits in the impact statement.

In Chelsea Neighborhood, supra, this Court noted that the housing project to be built atop the Postal Service garage had been cited as one of the primary benefits to be derived from the proposed action. 516 F. 2d at 387. Yet District Judge Ward found that the environmental statements had not adequately disclosed that the housing project might not be built. Chelsea Neighborhood Ass'ns. v. U.S. Postal Service, 389 F. Supp. 1171, 1180-81 (S.D.N.Y. 1975). This Court agreed that this inadequacy was fatal "for it is at least possible that without the housing the 'Assessment of Trade Offs' would result in a decision not to proceed with the project at all." 516 F. 2d at 389.

Another type of scenario which should have been discussed in the EIS was what would happen if only New Jersey, a logical place for pipelines to run, refused. As noted above, this is quite possible in view of that State's, and Cape May County's, publicly expressed views

of the program. While pipelines could be run to another State, if one agreed, it might be too expensive to do so if the distance is greater, thus making it economically unfeasible. Moreover, as the major Mid-Atlantic refineries are in New Jersey, the oil would then have to be piped onshore to New Jersey, if the State allowed that, or a new refinery might have to be built in another State -- in direct contradiction of an assumption in the Sale 40 EIS that no new refineries would be needed in the region (see, for example, Vol, II, p. 217). If that refinery were needed, a new analysis of land use and socio-economic impacts would be needed, all the more so because the new refinery may attract support facilities as well as a petrochemical complex using its waste products.

The district court said that the pipeline question could require a reconsideration of which Mid-Atlantic tracts would be best to lease (A. 76-77). The Secretary argues, surprisingly (Brief, p. 21), that the 154 tracts offered were the only ones containing oil and gas. This statement, however, is belied by the Secretary's intention to hold a second oil and gas lease sale in the

Mid-Atlantic within the next 2 years (A. 1005), which indicates that he thinks there are many valuable tracts remaining.

Appellants argue that the question of a possible Federal-State confrontation over pipelines and on-shore facilities is too speculative to be discussed in the Sale 40 EIS. However, the comments by the Mid-Atlantic states critical of the program indicated that such a confrontation is not merely speculative and should have been discussed in this context and, as the lengthy appendix to Judge Weinstein's opinion demonstrates, many state laws are in effect and very concrete. They provide an abundance of information that should have been discussed in the impact statement because of their importance in anticipating possible conflicts in the future.

For example, New York law which could affect the use of pipelines include the State Tidal Wetlands Act, New York Environmental Conservation Law ("ECL"), Article 25. Under the Act, there is presently in effect a total

moratorium on any alteration of a wetland or area adjacent thereto, subject to an exception in the case of a permit granted by the Department of Environmental Conservation on a showing that the proposed alteration is not contrary to the policy of the Act and that the applicant would suffer hardship. N.Y. ECL § 25-0202 (A. 192). Moreover, under Section 15-0505 of the ECL (A. 160), no one may excavate or place fill* in any navigable waters of the State (which includes waters to the 3-mile limit) without a permit from the Department of Environmental Conservation, which may refuse such a permit after ascertaining the probable effect on the State's natural resources. Obviously, this could serve to prevent the burial or laying of pipelines in the State's waters. In addition, the State Environmental Quality Review Act, ECL Article 8, provides, inter alia, that all State agencies granting permits have an obligation to carry out their functions in such way as to avoid or minimize adverse environmental effects. ECL § 8-0109(1) (A. 153).

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* Fill is defined to include, inter alia, metal and concrete, whole or fragmentary.

The Secretary's attitude toward the state's opposition is to assume that, after making small, cosmetic changes in the program, he can go ahead with it and assume that the states will finally cooperate. Although neither Alaska, California* nor New York has done so, this paternalistic attitude persists. Appropriately enough, that attitude is reflected in his brief. For example, on p. 22, he talks of the Government's effort at "coordinating" with the states by requiring that they be informed of the oil companies' exploration and development plans and be allowed to comment. The purpose is to allow the states to "anticipate and plan for onshore development."

What the Secretary overlooks is that the states may resist onshore development and be unwilling to plan for it. In that case there is nothing to coordinate; there is confrontation instead. Indeed, the

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* Interesting in this regard is an article on p. 1 of the N.Y. Times of September 21, 1976 showing how California's blocking plans to pipe Alaskan oil through the State has upset Government assumptions about how to deal with the anticipated West Coast oil surplus.

states are not even given the opportunity to veto any exploration or development plans. Those plans can be approved by the Secretary despite state opposition.*

NOIA's brief (p. 57) carries this paternalistic argument one step further, claiming that the Federal Government can use its funds under the Coastal Zone Management Act as amended to bribe the states into permitting pipelines and onshore development. According to NOIA (Brief, pp. 59-60) states accepting Federal funds under the 1976 amendments to that Act must surrender ultimate control to the Secretary of Commerce, who will disapprove any plan totally barring such development. However, even NOIA concedes that restrictions falling short of a total ban on a particular facility would not justify disapproval (Brief, p. 58 fn.).

Judge Weinstein pointed out, however, that the amendments require only that states give "consideration" to planning for onshore facilities, § 306(c)(8),

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* While the Secretary expounds on the states' alleged participation in tract selection (p. 8), there too they had no veto power, only the chance to comment.

16 U.S.C. § 1455(c)(8), but that the states could ultimately decide against permitting such facilities without forfeiting their right to the funds (A. 826, 828-29; Tr. 2758; A. 51-52). In fact, under the 1976 amendments, "the discretion of the Secretary of Commerce and other Federal officials should be correspondingly limited". Conference Report, p. 24, cited by the district court at A. 55.

In light of this, it is questionable that the Secretary of Commerce would withhold funds from states whose plans barred pipelines or development. Indeed, NOIA claims (p. 58 fn.) only that he could, not that he would. It is fair to say that if the statute does in fact mean that states surrender their sovereignty upon receiving Federal funds, as NOIA claims, it is very doubtful that the Mid-Atlantic states would seek such funds. New York has not applied for funds under the amendments.

NOIA's brief, in a footnote, takes the position that state action to bar pipelines "might well" violate the Commerce Clause or Supremacy Clause (p. 60 fn.). This argument was notably not made by the Government. It undermines almost everything else in the briefs of NOIA and the other appellants. The bulk of those briefs argue extensively that the Sale 40 EIS "recognized repeatedly that state and local governments could control land uses, even to the extent of banning pipelines" (p. 3 of NOIA's brief) and discussed "at length and in detail the rights of the states to control land uses within their jurisdictions and the concomitant possibility that tankers, instead of pipelines, would have to be used to land OCS oil should a state 'veto' the use of pipelines" (id. at 13). In fact, NOIA's own witness, Dr. Wenstrom, said that the states had such power (supra), as did NOIA's counsel, Mr. Bruce, in his argument to the district court (Tr. 2786). In the footnote on p. 60, however, NOIA appears to be saying that the purported discussion of state power in the Sale 40 EIS, which discussion was correctly held to be inadequate, was also untrue. That could hardly be a reason for finding the EIS adequate as appellants request. It rather would prove the EIS to be so misleading and deceptive as to render it legally inadequate, and to support the grant of injunctive relief.

In any event, however, the cases cited in that footnote do not support NOIA's claim therein, which is incorrect.*

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* In Transcontinental Gas. P.L.C. v. Hackensack Meadow Dev. Co., 464 F. 2d 1358 (3rd Cir. 1972) state action arbitrarily denying a building permit was struck down where the state's denial was based not so much on the proposed facility as on the fear of additional construction in future years and where the state had no regulations, standards or criteria applicable to construction of the facility in question. (*id.* at 1363). Continental Pipe Line Co. v. Belle Fourche Pipeline Co., 372 F. Supp. 1333 (D. Wyo. 1974) involved "exclusively" interstate commerce over which the state did not even assert jurisdiction, *id.* at 1336. N.Y. State Natural Gas Corp. v. Town of Elma, 182 F. Supp. 1 (W.D.N.Y. 1960) said that the interstate activities in question were not generally exempt from complying with local zoning ordinances, *id.* at 6, but found application of the ordinances unreasonable in that case. The plaintiff there had received a building permit which was later revoked pending a public hearing, but the Town unreasonably tabled the application and declined to hold a hearing because of a complaint against a third party not under plaintiff's control (*id.* at 4). In Penna v. West Virginia, 262 U.S. 553 (1923), a divided Court, over the dissents of Justices Holmes, McReynolds and Brandeis, held that a State which had previously "encouraged and sanctioned" the interstate sale of some of its resources could not unilaterally withdraw the commodity from interstate sale. The decision does not prevent a State from barring the interstate sale initially. Union Oil Co. of California v. Minier, 437 F. 2d 408 (9th Cir. 1970) held only that a State could not bring a criminal prosecution to prevent drilling on the OCS -- which after all is under a Federal control. The Court expressly declined to pass upon what is more relevant here -- state power "to punish those who, on the Outer Continental Shelf, do acts which have an effect upon the shores", *id.* at 411-2. If states might be able to prosecute those who take action on Federal land, certainly they may regulate activities on their own lands. United States v. City of Chester, 144 F. 2d 415 (3rd Cir. 1944), merely held that the war power of Congress had supremacy over municipal law, and that the construction by the Federal Government of emergency housing for people engaged in the national defense during World War II did not have to comply with a local building ordinance. Significantly, it was found that shortages of critical materials would have made it virtually impossible to comply with the ordinance (*id.* at 417). California v. Zook, 336 U.S. 725 (1949) upheld a state law as not pre-empted by a Federal statute. Hines v. Davidowitz, 312 U.S. 52 (1940) simply recognizes Federal supremacy over foreign affairs, and therefore registration of aliens. It is worth noting that Judge Weinstein concluded that no federal statute operated to deprive the states of their veto power over pipelines within the three-mile limit and therefore declined to decide whether Congress would even have the right to enact such a statute under the Commerce Clause (A. 64).

In summary, the issue underlying Judge Weinstein's decision is of great significance and very real. It was raised by the states long ago in their comments on the Programmatic EIS, and was raised again at the hearing, both by the witnesses and the court below. The Secretary's insensitivity to the state control issue and the failure of the Sale 40 EIS to consider it realistically are paralleled by the Secretary's failure to hear the issue each time it was raised. The lower court's ruling on this issue was correct, and the order granting the preliminary injunction should therefore be affirmed.

II. SALE 40 WAS ILLEGAL FOR ADDITIONAL
REASONS ARGUED BELOW BUT NOT ADOPTED
BY THE DISTRICT COURT.

During the hearing below appellees presented the testimony of many experts to establish the illegality of Sale 40. These experts included 8 scientists who described the statement's inadequate treatment of the likely environmental impacts of Sale 40. The witnesses were Professor Milgram of M.I.T., Professor Rachlin of the City University of New York, Dr. Teal of Woods Hole Oceanographic Institute, Professor Mitchell of Rutgers University, Professor McHugh of the State University of New York (Stony Brook), Professor Moore of M.I.T., Dr. Freudenthal, Chief of Marine Ecology for Nassau County, and Dr. Prager, an employee of the U.S. Environmental Protection Agency. In addition, 3 economists testified primarily with respect to the failure of the Sale 40 EIS to adequately consider alternatives to the proposed action. These experts were Professor Atkinson of the University of Miami of Ohio, Dr. Newlon, an employee of the National Science Foundation, and Mr. Donkin, an economic consultant formerly employed by the Federal Power Commission.

Despite the testimony of these experts, Judge Weinstein concluded that Sale 40 was illegal with respect to only the environmental impacts involved with the Federal-State issue discussed above. Without a detailed analysis of the other testimony in the opinion, he concluded that the EIS made a studied effort "to present a fairly grim picture of possible environmental difficulties" (A40) and that the Secretary's conduct was not otherwise illegal.

We respectfully submit that Sale 40 was illegal for reasons not relied on by the district court, and these reasons further justify the relief granted below and require an affirmance of the preliminary injunction.*

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* The State of New York did not cross-appeal from the order below because it granted all the relief being sought on the motion -- a preliminary injunction of Sale 40 pending final judgment. As appellee, however, we "may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although [our] argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." U.S. v. American Ry. Exp. Co., 265 U.S. 425, 435 (1924); Morley Construction Co. v. Maryland C. Co., 300 U.S. 185, 191 (1937); Walling v. General Industries Co., 330 U.S. 545, 547 fn. 5 (1947).

Appellants point out that most suits against other OCS lease sales have failed, although, as NOIA concedes (p. 18 fn.), one such suit, NRDC v. Morton, 458 F. 2d 827 (D.C. Cir., 1972), did succeed in enjoining a sale because of a NEPA violation.

The District of Columbia Circuit denied a motion for summary reversal of a preliminary injunction preventing a sale of oil and gas leases of some 80 tracts on the OCS off Louisiana. The sale was to include 380,000 acres, about 10% of the offshore acreage then under Federal lease. The injunction had been granted because an inadequate environmental statement had been filed.

Appellants rely on Sierra Club v. Morton, 510 F.2d 813 (5th Cir., 1975). Of course, like NRDC v. Morton, supra, that case dealt with a lease sale not part of the National Program, here the so-called MAFLA sale. The grounds for the attack on the environmental statement there did not include a number of matters strenuously litigated here, e.g., the termination clause issue and the energy conservation issue. With reference to People of the State of California v. Morton, 404 F. Supp. 26 (C.D. Calif. 1975), relied upon by

appellants, several points of distinction should be noted. This decision is currently under appeal on the ground that, not only was the decision substantively in error, but the decision purported to adjudicate the adequacy of the site specific environmental statement for the Southern California lease sale when that issue wasn't even tendered in the case. Appellant's Opening Brief at 26-31, People of the State of California v. Morton, No. 76-1431 (9th Cir.).* Indeed, the decision contains virtually no discussion of specific aspects of the environmental statement. Appellants also rely on State of Alaska v. Kleppe, Civ. No. 76-0368 (D.D.C. August 13, 1976) in which permanent relief against the Alaska lease sale was denied and Southern California Association of Governments v. Kleppe, Civ. Action No. 75-1942 (D.D.C. Dec. 5, 1975), in which a preliminary injunction to prevent the Southern California lease sale was denied. It should be noted that in neither of these cases was there an evidentiary hearing.** The Alaska case is presently on appeal.

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* No oral testimony was offered on any issue at the trial. Id. at 8. Plaintiff submitted only one affidavit. Id. at 18.

** In the Southern California Association of Governments case, the motion had been made approximately two weeks before the decision. The District Court issued a memorandum and order which contained less than 2 pages of discussion, none of which analyzed the deficiencies alleged by the plaintiff in that case.

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In any event, none of those cases dealt with the adequacy of the Sale 40 EIS, an issue which is raised for the first time by the present action.

A. The Discussion of Environmental Impacts
In The Sale 40 EIS Is Inadequate

In interpreting NEPA's requirements relating to the preparation of environmental impact statements, the courts have consistently held that NEPA is a full disclosure law which requires that all environmental effects be identified and assessed in the impact statement and that they be dealt with fully and candidly. The Court of Appeals for the District of Columbia has said that "the sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impacts of federal action." Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109, 1122 (1971).

The Council on Environmental Quality Guidelines on preparation of Environmental Impact Statements, 40 CFR Part 1500 ("CEQ Guidelines"), require that the statement "assess in detail the potential impact" of proposed action on the environment 40 CFR 1500.8(a)(3). Among the factors

to be considered are the potential effects of the action on marine pollution, commercial fishery conservation, shellfish sanitation, water quality, protection of wetlands, beaches and other environmentally critical areas, and outdoor recreation. 40 C.F.R. 1500.8(a)(3)(i).

The CEQ Guidelines further provide:

"Secondary or indirect, as well as primary or direct consequences for the environment should be included in the analysis. Many major federal actions * * * stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, * * * through inducing new facilities and activities, or through changes in natural conditions may often be more substantial than the primary effects of the original action itself."
40 C.F.R. 1500.8(a)(3)(ii).

Indeed, this Circuit has stressed that human and socio-economic impacts, as well as biological impacts must be considered. Chelsea Neighborhood, supra, 516 F. 2d at 387-388.

NEPA is not satisfied simply by the compiling of existing information, if that information on a critical aspect of the proposed action and its impacts is lacking. As stated in Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1403 (D.D.C. 1971):

"Section 4332(2)(A) [of 42 U.S.C., § 102(2)(A) of NEPA] . . . makes the completion of an adequate research program a prerequisite to agency action."

If the information is not available, the agency "must see to it that the necessary research is conducted." Brooks v. Volpe, 350 F. Supp. 269, 279-280 (W.D. Wash. 1972), aff'd, 487 F. 2d 1344 (9th Cir. 1973). Moreover, the agency cannot excuse data inadequacies by promising to continue research after a decision has been made. EDF v. Hardin, supra; Concerned Citizens of Buck Hill Falls v. Grant, 388 F. Supp. 394 (W.D. Pa. 1975); EDF v. Corps of Engineers, 492 F. 2d 1123, 1130 (5th Cir. 1974).

Indeed, in NRDC v. Callaway, ("Callaway"), 524 F. 2d 79 (2d Cir. 1975) (per Mansfield, J.), this Circuit, in holding that an environmental statement inadequately dealt with the cumulative effects of a U.S. Navy dumping project in Long Island Sound, rejected the argument that monitoring of the project substituted for prior environmental assessment in the impact statement. This Court said:

"The trouble with this suggestion is that it offers 'too little and too late' to enable the EIS to be of any effective use. The monitoring program, as we have noted, would probably not discover the adverse effects until millions of cubic yards of polluted spoil had been dumped and had irreversibly been started on what may well turn out to be a program of

destruction. . . . Surely the Navy's EIS, despite the present paucity of information on cumulative effects, should be required to furnish some information on and analysis of the subject rather than postpone the matter for consideration by others while it embarks upon such a serious project." Id. at 90 (emphasis added).

Section 102(2)(C) of NEPA, which sets forth the impact statement requirement, must be read in conjunction with other procedural requirements of NEPA regarding environmental assessment. Section 102(2)(A) of NEPA, 42 U.S.C. § 4332(2)(A), requires that all federal agencies shall utilize a systematic interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and decision-making which may have an effect on man's environment. Section 102(2)(B) of NEPA, 42 U.S.C. § 4332(2)(B), requires that all federal agencies identify and develop materials and procedures, in consultation with the Council on Environmental Quality, which will ensure that presently unquantified environmental amenities and values may be given appropriate considerations in decision-making, along with economic and technical considerations. Section 102(2)(H) of NEPA, 42 U.S.C. § 4332(2)(H), requires that all federal agencies shall initiate and utilize ecological information in the planning and development of resource-oriented projects.

The evidence before the district court strongly demonstrated the inadequacy of the Sale 40 EIS. For example, 90% of the discussion of biological communities and impacts on them was lifted ad hoc and without apparent methodology from various literature surveys, and is therefore third hand (A 603-4; 609; 565-6). This was due apparently to the great rush to prepare the EIS (A 613; 631). The sources were old, and reliance on them resulted in erroneous conclusions (A 482-3; 602). At the same time, the EIS ignored a large volume of available high-caliber scientific knowledge, including leading treatises on various relevant topics (A 611-2), and other works (A 614-620). Also ignored was available information on Mid-Atlantic fisheries (A 464-6), including data collected by the National Marine Fisheries Service ("NMFS") in the U.S. Department of Commerce (A 633-5; 744). By contrast, the visual fisheries data in Volume 4 of the EIS contains no information that would be useful to a decision-maker (A 488; 537-8).

In light of the above, the Sale 40 EIS comes nowhere close to meeting the stringent requirements of NEPA.* Its biological discussion is a mere catalogue or laundry

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*The U.S. Environmental Protection Agency expressed environmental reservations after reviewing the Sale 40 EIS (A 1368).

list without consideration of cause and effect or the interrelationships of the organisms involved (A 479, 605), and is largely on a third-grade level (A626-8). It similarly lacks interpretations, which are needed to explain to the decision maker what the scientific minutiae indicate (A608, 610).

The Sale 40 EIS fails to consider the important questions raised by Sale 40, such as the cumulative effects of various sublethal impacts on the marine environment, or more generally the likely impact of Sale 40 on Atlantic fisheries which are already under stress (A257-8; 507). It nowhere discusses the apparent relationship between oil spills and cancer in clams (A632). While the EIS does note certain of the data gaps about impacts on the biological communities, the necessary research was not done, nor does the EIS explain to the decision-maker the risks of proceeding without the necessary information (A572-3).

While the Sale 40 EIS contains a discussion of heavy metals, it fails to stress the important point -- the potential toxic implications of these metals (A629-30), as evidenced by the mercury-poisoning incident in Japan in which 111 people were severely poisoned (A247-250). Moreover, these heavy metals have serious sublethal impacts on marine organisms at only 10% of their lethal concentrations, by reducing their

growth rate and ultimately reducing their population (A244-6; 250-1). This fact was not discussed in the FFS. Significantly, an appendix circulated by Interior with a preliminary draft impact statement -- which appendix did attempt to quantify hazardous concentrations of heavy metals -- was omitted from the EIS (A252-6; 1146-69).

Apart from the many serious omissions in the Sale 40 EIS, that statement is also misleading in many ways. It often reaches conclusions that are contrary to fact and understate the likely impacts of the sale. For example, Vol. II, p. 127, suggests that oil spills do not seriously impact marine life because "[c]ontinuous oil spills occurred in the Mid-Atlantic region during World War II [and no] irreversible or permanent damage to the planktonic community has been reported." But the reason no such reports have been made is acknowledged (Vol. I, p. 615) to be that "no efforts to determine the long-term effects of these spills" was made. Thus, the conclusion suggested in Volume II is blatantly deceiving.

Similarly deceptive is the statement, in Volume II, p. 136, that recovery of the benthic community from an oil spill "is expected to occur in a short time." While the term "short time" is obviously calculated to make the Secretary think the impacts of oil spills are minimal,

that conclusion is belied by pages 130-131 of that Volume, which indicate that recovery could require as many as 5-10 years.

The Sale 40 EIS understates the risks from oil spills in other respects as well. Its discussion of trajectories deals only with oil spills occurring within the area of the tracts being offered, and does not include spills nearer to shore, such as those resulting from pipeline breaks or tankers (A752). This is of great importance in light of the uncontradicted testimony that under present technology pipeline leaks of less than 500 lbs. per square inch could go undetected for 8 hours, spilling as much as one million gallons of oil (A223-5). Moreover, the trajectories map only the center of the oil slicks, and the EIS fails to point out that even if the center of a spill failed to reach Long Island lumps of oil from the edges could reach shore and substantially damage a beach (A753-5). Further, the model takes into account only the oil on the surface of the water, and not the damage to fish caused by the hydrocarbons dissolving in the water (A272).

While the EIS generally concedes that it is difficult to contain or clean up oil spills in rough seas, it nonetheless exaggerates the current capabilities in this field. In Volume II, pp. 435, 442, it is said that the Coast Guard has

developed a barrier that is effective in 2 knot currents, whereas in fact no boom is effective in such a strong current. So testified Professor Milgram, one of the designers of that barrier (A236, 239). Similarly, another clean up device cited in the EIS (Volume II, p. 435), the High Seas Oil Recovery System, is also unable to perform as indicated (A239-40). Moreover, the present system, under which the Regional Response Team meets after a spill has occurred to decide who will clean it up, is "crazy," because the time lost is critical (A238). The EIS fails to explain the necessity of beginning cleanup efforts at once. Yet, even with prompt efforts it may be impossible to collect as much as half of an offshore spill being carried toward the shore (A232-3).

The Sale 40 EIS is also very deceiving in indicating, at Volume II, p. 441, that OCS Operating Order 7 requires the "most effective available [equipment], given the current state of oil pollution containment and cleanup technology." In fact, the Government's witness admitted that the order makes no such explicit requirement (A800-802).

The Sale 40 EIS is also inadequate and misleading in its discussion of onshore impacts and the amount of land that will be committed as a result of Sale 40. Dr. Mitchell's testimony to this effect is being discussed more fully in the

brief of appellee the Natural Resources Defense Council ("NRDC"). We would point out, however, the failure of the EIS to quantify the potential financial harm to Long Island from oil impact to its beaches, which could result in \$10 million losses per week in tourist spending and place thousands of local jobs in jeopardy (A373-4).*

While defendant NOIA produced two biologists from the Gulf region who claimed that the Sale 40 EIS was adequate, their testimony is not entitled to much weight. Both Drs. Oppenheimer and Smalley had received funding from the oil industry, and both had made themselves advocates for the industry through prior testimony on its behalf (A 720; 762). Oppenheimer was also a former oil company employee (A 711). Neither witness had ever studied the effects of hydrocarbons on the Mid-Atlantic region; indeed, Dr. Smalley had never done any work on hydrocarbons prior to his work for the oil industry (A 760-761; Tr. 2039). Yet Dr. Oppenheimer conceded that the Mid-Atlantic was different from the Gulf in numerous ways (A 741-2). Moreover, Dr. Oppenheimer conceded that Gulf fish were tainted with oil as a result of OCS operations (A 739-40).

*In the court below the Secretary's defense of the Sale 40 EIS consisted largely of his contention that its mere mention of a topic was sufficient, even if nothing meaningful was said about it (A 622-5).

Dr. Oppenheimer did testify on direct to one inadequacy of the Sale 40 EIS (A 712, 715) and on cross he conceded that NMFS spawning data was omitted (A 744). He also conceded that oil activities would lead to a tremendous increase in water hydrocarbons -- from less than 60 parts per billion to one part per million (A 713-714).

B. The Discussion of Cumulative Impacts
In The Sale 40 EIS Is Inadequate

The requirement under NEPA that an impact statement discuss cumulative impacts is best demonstrated by this Court's decision in NRDC v. Callaway, supra; Accord, Jones v. Lynn, 477 F. 2d 885, 891 (1st Cir. 1973). In Callaway, this Court, reversing the district court, directed it to preliminarily enjoin the United States Navy from further dumping in Long Island Sound of dredged spoil from the Thames River in Connecticut. The project was being carried out so as to allow the Navy's introduction and deployment of a new class of attack submarine at the Navy's submarine base in Groton, Conn.

This Court held, among other things, that the impact statement was inadequate for failing to analyze the cumulative impacts of the Navy project in conjunction with pending proposals by other governmental and private parties to dump

spoil at or near the site. This Court said: "To ignore the prospective cumulative harm under such circumstances could be to risk ecological disaster." 524 F. 2d at 88. As pointed out above, the Court also rejected excuses raised by Navy, similar to those raised by the Secretary in this action, for failing to do the analysis: the alleged lack of scientific knowledge and the claim that there would be a continuing monitoring program after the project was undertaken.

The inadequacy of the treatment of cumulative impacts in the Sale 40 EIS is evident from the fact that Sale 40 is intended by the Secretary to be "the first of six sales planned for the area within the next 2 years. In the works are a sale in the North Atlantic in early 1977, a sale in the South Atlantic in early 1977 and a second sale in each of the Atlantic areas by 1978" (A 1005). That is, there will be 2 sales in each area of the Atlantic by 1978. Indeed, in August 1975 the Interior Dept. in Washington directed its New York office to emphasize in the draft EIS for Sale 40 "the potential cumulative impacts of proposed sale no. 40 in relation to a possible future sale (no. 49) in the mid-Atlantic region and also include an analysis of impacts from any other proposed or possible future energy related activities in the region." (A 1332).

To be sure, the Sale 40 EIS contains a section purporting to deal with cumulative impacts of these other OCS lease sales (Vol. II, pp. 372-378). That simplistic and uninformative statement is essentially limited, however, to the second proposed Mid-Atlantic sale, No. 49. It does mention one proposed sale in the North Atlantic (No. 42) and one proposed sale in the South Atlantic (No. 43), but does not discuss the cumulative impacts from them, saying instead (p. 378) that the cumulative impacts on the Mid-Atlantic region from Sales 42 and 43 will first be discussed in draft environmental statements for those latter sales, which would not be published until after Sale 40 was held. In other words, contrary to NEPA, the Sale 40 EIS does not discuss those cumulative impacts, and the decision to hold Sale 40 announced in June 1976 was made by the Secretary before any such discussion appeared in any impact statement. This is a patent violation requiring injunctive relief under Callaway, supra. Even worse, the second proposed sales for each of the North and South Atlantic were not even mentioned in the cumulative impact section, thus making the discussion deceptive as well as incomplete.

The failure of the Sale 40 EIS to discuss cumulative impacts is of particular consequence to New York, which is situated off both the Mid-Atlantic and North-Atlantic OCS regions

and could be severely impacted by any one of the 4 sales contemplated for those regions in the near future, and surely by the 4 sales cumulatively. It would be exposed to oil spill damage from each sale site and its fisheries could be damaged by hydrocarbons from any of them. Indeed, the absence of any major refineries in New England suggests that oil from the 2 North Atlantic sales may be transported to the Mid-Atlantic to be refined (A 520), creating severe impacts onshore and offshore.

C. The Discussion of Alternatives In
The Sale 40 EIS Is Inadequate

The obligation that an impact statement consider alternatives to the proposed action is so firm under NEPA that this Court has said it is even "of wider scope than the duty to file the EIS." NRDC v. Callaway, supra, 524 F. 2d at 93. The Court there said:

"It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as 'the linch-pin of the entire impact statement', Monroe County Conservation Society, Inc. v. Volpe, 472 F. 2d at 697-98. Indeed the development and discussion of a wide range of alternatives to any proposed federal action is so important that it is mandated by

NEPA when any proposal 'involves unresolved conflicts concerning alternative uses of available resources,' 42 U.S.C. § 4332(2)(D). This requirement is independent of and of wider scope than the duty to file the EIS, Trinity Episcopal School Corp. v. Romney, Dkt. No. 75-7061 (2d Cir., July 24, 1975), at 5079-81; Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F. 2d 1123, 1135 (5th Cir. 1974)." Id. at 92-93

The Court specified that the environmental statement must consider "such alternatives as may partially or completely meet the proposal's goal," id. at 93 (emphasis supplied), and, after adverting to the "rule of reason" added:

"[W]e believe that it is not beyond reason to require the EIS to furnish in an understandable fashion a discussion of all dumping site alternatives, their relative merits and demerits with sufficient supporting data, and the reasons for choosing one over the others. Even after making allowances for the admitted lack of knowledge about several of the proposed dump sites, this standard was not met here."
Id. at 93, n. 12.

Moreover, in Chelsea Neighborhood, supra at 389, this Court also held that the environmental statement was inadequate because the discussion of alternatives was conclusory and uninformative.

And, in NRDC v. Morton, supra, the Court said that the Secretary's duty in an OCS impact statement was to consider all reasonable alternatives, whether or not he had authority to implement them, because the discussion could be considered by others who would have that authority. The Court stated:

"When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened. While the Department of the Interior does not have the authority to eliminate or reduce oil import quotas, such action is within the purview of both Congress and the President, to whom the impact statement goes.

* * *

"What NEPA infused into the decision-making process in 1969 was a directive as to environmental impact statements that was meant to implement the Congressional objectives of Government coordination, a comprehensive approach to environmental management, and a determination to face problems of pollution while they are still of manageable proportions and while alternative solutions are still available rather than persist in environmental decision-making wherein 'policy is established by default and inaction' and environmental decisions 'continue to be made in small but steady increments' that perpetuate the mistakes of the past without being dealt with until 'they reach crisis proportions.' S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969) p. 5." 458 F. 2d at 835-836 (emphasis added)

The Sale 40 EIS fails to give adequate consideration to alternatives or combinations of alternatives (A. 642). In fact (see Vol. II, p. 532), to a large degree it substitutes for the required analysis a reference to the University of Oklahoma's Energy Alternatives: A Comparative Analysis (Def. Ex. T). Not only is it improper under NEPA for the responsible agency to refer the reader elsewhere for this critical discussion, and to a book not as available as the EIS itself, but furthermore the cited book does not even analyze the various energy sources as alternatives to OCS drilling (A 660-661). Moreover, the Secretary did not look at it before reaching his decision (A 1357-9).

One alternative not considered was that, in light of the future price of oil projected by the Federal Energy Administration, those conservation measures already adopted in the Energy Policy and Conservation Act of 1975, 42 U.S.C.A. §§ 6291-6363, 15 U.S.C.A. § 2001-2012, would achieve the measure of energy self-sufficiency which President Ford is seeking by 1985, namely only 3 to 5 million barrels of oil imports per day (A 645-7). The environmental statements also did not adequately consider the range of energy conservation options available (Tr. 1390, 1394-96).

Another alternative not considered was including in the leases a clause permitting the Secretary to terminate

the leases if necessary to protect the environment. This alternative is eminently reasonable in light of the present system, under which exploration and biological studies are carried out essentially after, not before, leases are sold. Thus, if those activities should reveal that great environmental hazards will result from oil activities in the area, the Secretary should have the power to terminate.

The Secretary contends, however, that existing law permits him only to suspend the lessees' activities temporarily, but not to terminate for environmental reasons, and that he was therefore under no duty to consider this alternative. That contention is said to be based principally upon Union Oil Co. v. Morton, 512 F. 2d 743 (9th Cir. 1975), which case dealt only with the question whether a lease which had not expressly been made subject to termination for environmental reasons could nevertheless be suspended. The Court determined only that the Outer Continental Shelf Lands Act ("OCS Lands Act"), 43 U.S.C. § 1331 et seq., did not grant a right to terminate such a lease for environmental reasons and that under some circumstances a suspension could amount to a termination.*

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* Gulf Oil Corp. v. Morton, 493 F. 2d 141 (9th Cir. 1973), also relied upon by the Secretary below, similarly fails to support his position. It merely held that a lease lacking a provision expressly allowing for suspension or termination could no longer be suspended for the purpose of permitting Congress to consider pending legislation to terminate the lease where there had been four unsuccessful efforts to pass such legislation and even the Secretary had decided that such legislation should not be enacted. Interestingly, the Secretary had never based his suspension on any acute risk of environmental harm. Id. at 143, 146.

Nothing in the opinion suggests that the OCS Lands Act prohibits inclusion of a termination clause in a lease. Indeed, the Court would hardly have made such a suggestion in light of its observation:

"NEPA directs that we construe the Outer Continental Shelf Act in light of Congress' desire to 'create and maintain conditions under which man and nature can exist in productive harmony' 42 U.S.C. § 4331(a), 4332. NEPA's goals supplement the original goals of the Act. 42 U.S.C. § 4335." Id. at 749.

Significantly, section 3301.4 of Title 43 of the Code of Federal Regulations, adopted pursuant to the Outer Continental Shelf Lands Act, provides that the Department shall develop special leasing stipulations and conditions when necessary to protect the environment and all other resources. Yet the Secretary claims he could not include a termination clause because that would run afoul of the OCS Lands Act provision that an oil and gas lease shall be for a period of at least five years. 43 U.S.C. § 1337(b). However, he fails to demonstrate why a lease provision conferring the power to terminate upon certain stated conditions is inconsistent with a lease for a specified time, particularly under the OCS Lands Act with its expressions of concern for the conservation of the resources of the OCS,

including its marine, animal and plant life. 43 U.S.C.
§§ 1334, 1301(e).

An important alternative that was only superficially discussed in the Sale 40 EIS is that of separating exploration from development. Neither the Sale 40 EIS, nor for that matter the Programmatic EIS, dealt adequately with this issue (A. 669). For example, no consideration was given to whether the resources of the OCS would be more valuable to the nation in the future, or whether we would have a stronger weapon against OPEC by deferring OCS development (A 696, 699). Nor is there adequate consideration of the benefits to be gained by determining initially the amount of the reserves so that a more precise analysis of costs and benefits of production could then be undertaken. That procedure would have allowed for a decision against production if further exploration indicated that the reserves were low and not worth the environmental costs, or if we learned that tankers rather than pipelines would have to be used -- contrary to the assumption underlying the impact statement. Both Dr. Teal and Dr. Rachlin testified that, from the point of view of the biological effects of oil leasing, it would be beneficial to separate the exploration and development decisions (A 266, 294). Moreover, Dr. Atkinson testified, a separation of exploration from development would allow the nation to make an informed decision on the pace of

production as part of a transition from conventional to non-conventional sources of energy, after more precise data on the extent of OCS resources became available (A 662-3; 669-673).

Yet another alternative not discussed in the Sale 40 EIS is one requiring the use of the best available technology, so as, at least, to minimize any harm to the environment. This simple and most reasonable alternative was considered only briefly in the draft Programmatic EIS, (Def. Ex. D., Volume II, pp. 425-426), where certain benefits and costs of such a requirement were mentioned. The question of whether the costs were worthwhile in light of the benefits certainly deserved further consideration by the Secretary, but discussion of this option was dropped in the Programmatic EIS and in the Sale 40 EIS.

The Secretary contends that U.S. Geological Survey ("USGS"), part of the Interior Department, informally requires the use of advanced technology. However, reliance on USGS policy is not an adequate substitute for a legal requirement. For one thing, USGS apparently gets its information about new technologies essentially from the oil companies themselves (A 801). It also refrains from enforcing its policy if it fears hardship would result to the oil company (A 799). Moreover, USGS regulation has not been reliable in the past (A 803-7).

Also not discussed in the Sale 40 EIS is whether or not there are other oil and gas reserves that should be developed before any lease sale is held in the Mid-Atlantic. As economist George Donkin testified, there are many non-producing leases in the Gulf of Mexico which are likely to be better sources of oil and gas and which could be developed much more quickly (A 1176-1187). Relying on data of the Federal Power Commission ("FPC"), he demonstrated that there are over a thousand non-producing oil and gas leases in the Gulf, including 186 producible shut-in leases. Apart from oil, these leases contain vast reserves of natural gas, probably more than the Sale 40 site. The Gulf area is well known to have enormous reserves (A 704-07), and should be tapped before the Mid-Atlantic, which could prove to be non-productive. And, since much of the oil and gas in the Gulf has already been located, it could be produced immediately or within a very short period, whereas Mid-Atlantic oil and gas would not be available for 8 years (A 765-7).

As to the alleged shortage of natural gas, witnesses testified that it was the result of the artificially low price for interstate natural gas set by the FPC, which made gas companies unwilling to sell large quantities of gas interstate (A 709, 764). They preferred to sell at higher, unregulated intrastate prices. In July 1976, however, the FPC nearly

tripled the price of interstate gas from 52¢ to \$1.42 with an escalation provision, and that price increase provided added incentives for gas exploration, and should result in a "significant increase" in drilling and substantially higher gas supplies in future years (A 768-770). Indeed, the price increase would also make available gas previously withheld for intrastate markets (A. 708). Moreover, it was acknowledged that OCS gas would be so allocated by the FPC that the Mid-Atlantic states would not get an undue portion of it; New York would receive only 8% (Tr. 2320-1).

D. The Sale 40 EIS Is Inadequate Because It Does Not Contain A Cost-Benefit Analysis

In his memorandum submitted to the district court after the hearing, the Secretary said: "NEPA clearly requires a consideration of environmental factors and a balancing of environmental harms against the benefits to be achieved from the proposed action." (Document 66 in Index on Appeal in County of Suffolk v. Dept. of Interior, p. 65). This is a correct statement. In Chelsea Neighborhood, supra, this Court said:

"NEPA, in effect, requires a broadly defined cost-benefit analysis of major federal activities. It seeks to insure that more than economic costs alone are considered.

"'Environmental amenities' will often be in conflict with 'economic and technical considerations.' To 'consider' the former 'along with' the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance. Calvert Cliffs; supra, 449 F. 2d at 1113."
516 F. 2d at 386-87.

This Court emphasized that the proposed benefits must be analyzed as well, so that the trade-offs could be realistically determined (id. at 389). Accord, NRDC v. Morton, supra, 458 F. 2d at 833.

According to Dr. Atkinson, the Mid-Atlantic EIS and the Programmatic EIS do not even purport to set forth a cost-benefit analysis of the decision to hold Sale 40 or adopt the National Program of which it is a part (Tr. 1465-1466). In light of these inadequacies the decision to hold Sale 40 violates NEPA.

E. Sale 40 Violated NEPA Because The Programmatic EIS Was Not Circulated As A Draft

As indicated in the Secretary's brief (pp. 6-7), the Programmatic Draft EIS sets forth a program significantly different from that in the Programmatic EIS. Among other

things, while the Programmatic Draft EIS sets forth a program to increase OCS oil and gas leasing to 10 million acres in 1975 and tentatively designates 6 lease sales for that year, the National Program set forth in the Programmatic EIS does not have any acreage limitation and provides for acceleration of leasing, not only in 1975, but also in each year through 1978, according to a schedule of 6 lease sales per year.*

This significant change required that the Programmatic EIS be circulated as a draft for full governmental and public review and comments and for hearings. Worth noting are the words of this Court in recently reaffirming its approach to supplemental environmental statements in NRDC v. NRC, ____ F. 2d ____, slip. op. 3903 (May 27, 1976), reh. den. ____ F. 2d ____, slip. op. 5483 (Sept. 8, 1976):

"'Although an EIS may be supplemented, the critical agency decision must, of course, be made after the supplement has been circulated, considered and discussed in the light of the alternatives, not before. Otherwise the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it.'
(Natural Resources Defense Council, Inc. v. Callaway, supra, 524 F. 2d at 92.)"

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*Contrary to the Secretary's brief (pp. 6-7), this change was not the result of meetings between federal and state officials and public hearings but the result of the Interior Department's lack of staff to handle the original program (Exhibit 70, p. 161).

Sale 40 violates NEPA because the EIS for the national program of which it is a part was not circulated as required before the national program was adopted.

F. Sale 40 Violated NEPA Because No Environmental Statement Was Filed Regarding The Policy Of Achieving Energy Self-Sufficiency, Which Underlies The Adoption Of The National Program.

On April 18, 1973, President Richard M. Nixon announced the adoption of a goal of reducing long-term reliance on imported oil and toward that end directed the Secretary of the Interior to triple the annual acreage leased on the OCS by 1979 (A 1263, 1269). On November 7, 1973, President Nixon announced the adoption of the goal of total energy self-sufficiency by 1980 (A 1291). Then, on January 23, 1974, President Nixon announced that, for the purpose of meeting the goal of total energy self-sufficiency by 1980, he was directing the Secretary of the Interior to increase acreage leased on the OCS to 10 million acres beginning in 1975, which he said constituted more than triple what had originally been planned (A 1296-1297). The policy of achieving energy self-sufficiency has remained in effect, although President Ford has altered the definition of energy self-sufficiency, as pointed out above, and extended the time by which energy self-sufficiency is to be achieved to 1985, rather than 1980 (A. 645-646).

This Court has recently emphasized the importance of generic environmental statements regarding federal action on a broad scale in NRDC v. NRC, supra, at 3927-3930.* The Court cited with approval the following:

"The legislative history of the Act indicates that the term "actions" refers not only to the construction of particular facilities, but includes "project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs" Scientists' Institute, supra, 431 F. 2d at 1088, quoting S. Rep. No. 91-296, 91st Cong., 1st Sess., 20 (1969), U.S. Code Cong. & Admin. News 1969, p. 2751." Id. at 3927, ft. 11 (Emphasis supplied). Accord, CEQ Guidelines, 40 CFR 1500.5.

As Professor Atkinson pointed out, the adoption of the policy certainly was a major federal action that has significant implications for the environment (A 643). Its character as a "major" action significantly affecting the environment is exemplified by the particular implementation here, i.e., the national program and Sale 40.

Nevertheless, although the Interior Department participated in the formulation of the policy of energy self-sufficiency (A 1362-1367) and although it has implemented

* Kleppe v. Sierra Club, 44 U.S.L.W. 5104 (U.S. June 28, 1976), is not to the contrary since in the instant case there is no doubt that the energy self-sufficiency policy was adopted.

the policy by adopting the national program (Programmatic EIS, Vol. 1, p. 10), it has never filed an environmental impact statement regarding the establishment of the policy. Nor was that policy subjected to a NEPA analysis as in the Programmatic EIS or the Sale 40 EIS (A 642-644). Since Sale 40 is part of the national program, which in turn implements the energy self-sufficiency policy, the Sale 40 is in violation of NEPA.

G. The Secretary Violated NEPA
By Failing to Consider Ade-
quately The Environmental
Impacts of, or Alternatives
To, Sale 40

The Secretary's action in scheduling Lease Sale No. 40 violates NEPA Sections 102(2) (A) (B) (C) (E) and (H) because, quite apart from his obligation to detail the environmental impacts and alternatives, the Secretary has an affirmative obligation to consider them in deciding upon his proposed action, and he did not do so.

NEPA requires more than the preparation of an adequate impact statement. Section 102 of NEPA, 42 U.S.C. § 4332, requires that federal agencies "give full 'consideration' to environmental impact as part of their decision-making process." Calvert Cliffs' Coord. Com. v. U.S. Atomic Energy Comm'n, 449 F. 2d 1109, 1112n.5 (D.C. Cir., 1971):

"Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates. This compulsion is most plainly stated in Section 102." *Id.* at 1112 (original emphasis).

The Court of Appeals there concluded that if the agency's

"decision was reached procedurally without individualized consideration and balancing of environmental factors -- conducted fully and in good faith--it is the responsibility of the courts to reverse." Id. at 1115 (emphasis added).

This Court has similarly indicated that a decision must not be made until after a complete and adequate impact statement has been considered, stating: "Otherwise, the process becomes a useless ritual, defeating the purpose of NEPA, and rather, making a mockery of it." NRDC v. Callaway, supra, 524 F. 2d at 92. Other courts as well have repeatedly said that mere "mechanical," "pro forma" compliance with Section 102 is insufficient as a matter of law. See, e.g., Lathan v. Brinegar, 506 F. 2d 677 (9th Cir. 1974); Chelsea Neighborhood Assns. v. U.S. Postal Service, 389 F. Supp. 1171, 1185 (S.D.N.Y.), affd 516 F. 2d 378 (2d Cir. 1975).

Although NEPA requires that environmental impacts and alternatives be considered as part of the decision-making process, the record here establishes without question that the decision to accelerate OCS leasing and to hold lease sales under that program was made long before the NEPA

documents were prepared, and even before the Arab oil embargo. Despite all claims that the program is a response to that embargo, the decision was announced by the President prior to it, in April 1973. The NEPA documents, subsequently prepared, played no role whatever in the decision to accelerate, and amounted to a mere pretense of compliance with the Act.

Contrary to the District Court's suggestion (A43), we are not saying that NEPA bars "discussion and debate among high public officials and decisionmakers." In fact, NEPA seeks to promote just that. Here, however, the ultimate decision preceded the NEPA process.

On April 18, 1973, President Nixon directed the Secretary "to take steps which would triple the annual acreage leased on the Outer Continental Shelf by 1979" (A1263). This direction followed the Secretary's submission to the White House of a recommendation that OCS leasing be accelerated (A924; 1363). While the President indicated that environmental matters would be considered in deciding where to lease, the announcement embodied his decision to proceed with the accelerated leasing program -- without going through the NEPA procedures. This decision,

significantly, was made several months before the Arab oil embargo, which commenced in the Autumn of 1973, and 2 1/2 years before the national program was purportedly adopted by Acting Secretary Frizzel on September 29, 1975.

On January 23, 1974, again on the Secretary's recommendation (A1365), President Nixon, ostensibly in order to make the nation energy self-sufficient, announced a further acceleration in OCS leasing. The President said:

"Today I am directing the Secretary of the Interior to increase the acreage leased on the Outer Continental Shelf to 10 million acres beginning in 1975, more than tripling what had originally been planned." (A1297).

Once again, the President said that environmental factors would be considered in deciding on specific lease sites, but a firm decision had been made on whether to accelerate.

In or about October 1974, the Interior Department issued a statement noting that it had been "publicly committed for many months to the idea of leasing 10 million acres of Outer Continental Shelf lands during 1975, and to the idea of leasing areas on the Atlantic and Gulf of Alaska OCS when it becomes feasible" (A1302; emphasis in original).

In November 1974 Governors of coastal states met with government officials in Washington, D.C. Addressing the Governors on November 13, 1974, President Ford said:

"I believe that the outer continental shelf oil and gas deposits can provide the largest single source of increased domestic energy during the years when we need it most. The O.C.S. can supply this energy with less damage to the environment and at a lower cost to the U.S. economy than any other alternative. We must proceed with a program that is designed to develop these resources." (A1304).

The following day Interior Secretary Morton echoed the President's remarks (A1306). In his State of the Union address on January 15, 1975, President Ford again addressed the question of OCS exploration, indicating that the decision had been made to proceed with the program, the only question being in which sites (A1315-16). A few weeks later, Secretary Morton advised New Jersey officials of the Administration's position that offshore oil must be developed as quickly as possible (A1320).

In February 1975, Sale No. 37, for the South Texas OCS, was held, and Sale No. 38, for the Central Gulf,

was held in May 1975 (A1342). Both sales were designated in the Programmatic EIS (Vol. II, p.1) as being in the National Program, yet they were held well prior to the filing of the Programmatic EIS in July 1975.

On July 9, 1975, President Ford sent to Congress proposed legislation dealing with oil pollution liability. In his transmittal message the President said that the nation's energy needs "require accelerated development of our offshore oil and gas resources." (A1322).

Similarly, with respect to the Mid-Atlantic lease sale, the decision to go ahead was made long before the official announcement. Evidence of Secretary Kleppe's decision came on March 3, 1976, more than 2 1/2 months before the Sale 40 EIS was released, when he declared that the OCS program was highly positive and that "[c]hronic pollution from the shelf does not -- in all probability -- pose a serious threat to the Atlantic Coast." (A1328). The Secretary's impatience with the NEPA process was again betrayed by his announcement to the press on June 16, 1976 of his decision to hold the Mid-Atlantic Sale, without waiting the required 30 days from the time the Sale 40 EIS was filed with the Council on Environmental Quality ("CEQ")

on May 25, 1976 (A896-901; 1257-8). This constituted a flagrant violation of the CEQ Guidelines, 40 C.F.R. §1500.11 (a). Those Guidelines were designed to require that the EIS be studied for at least 30 days before a decision was made. The Secretary's violation here is further evidence that the decision to lease had long since been made, and the NEPA process was a charade so far as it pretended to be a prelude to that decision.

The President's repeated proclamation of the decision made consideration by the Secretary impossible. As former Interior Assistant Secretary Royston Hughes said, once the President announces a goal, the Secretary "either supports it or resigns" (A925). This dilemma for the Secretary prevented his giving environmental concerns the necessary open-minded consideration required by NEPA.*

Not surprisingly, the Secretary announced his decision to proceed with the national program in September 1975 without even reading the Programmatic EIS from a policy or decision-making point of view (A876, 879).

Even if he were inclined, and at liberty, to give the consideration required by NEPA, the Acting Secretary,

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* Prior determinations by the President, or by Congress, did not exempt the Secretary from NEPA's mandate that he fairly consider alternatives to the OCS program. NRDC v. Morton, supra, 458 F. 2d at 836.

Mr. Frizzel, would have been unable to do so. For one thing, he did not truly comprehend the option of separating exploration from production. His knowledge of the issue was "very casual" (A878), and he admittedly had little understanding of the advantages of separation (A877).

Nor was Acting Secretary Frizzel in a position to give adequate consideration to the conservation option. The Programmatic EIS said that the "primary environmental impacts of conservation are unquestionably beneficial" (Vol. II, p. 295), and could save more energy in 1985 than the OCS could produce by then (id., p. 296). It concluded that conservation would "bring net benefits, not costs, to the society as a whole" (id., p. 300).

However, also before him was a Program Decision Option Document ("Programmatic "PDOD") prepared by the Interior Department for the Secretary to explain the options available on the decision (A944). Mr. Frizzel read this document word for word -- much more closely than the Programmatic EIS -- before announcing his decision (A879, 890). The Programmatic PDOD, however, reached the opposite conclusion, that mandatory conservation -- includ-

ing some of the same measures approved of in the EIS -- imposed "net costs" and was therefore less desirable than OCS production.

The PDOD's conclusion was:

"...as long as the total cost per barrel of OCS oil is less than the price of oil, it is better to increase OCS production by one barrel than to conserve an additional barrel through mandatory conservation measures. This is true because the barrel of production has a price (value) in excess of its total cost; thus it provides a net savings if it is produced. Mandatory conservation, on the other hand has net costs. It is therefore better to increase OCS production than to impose mandatory conservation if the total production cost of OCS oil is less than its price." (A956; emphasis added).

Obviously, the entire NEPA process is subverted by a recommendation to the Secretary in the non-public Programmatic PDOD that contradicts the Department's public position in the EIS.

Moreover, the cited statement in the PDOD was

simply wrong as a matter of economics, and the Assistant Secretary responsible for preparing the PDOD, Royston Hughes, had no comprehension of what it meant (compare A903, 910, 914, with A650-9). As plaintiffs' economists explained, the market is imperfect, and therefore government imposition of mandatory conservation measures can often generate net benefits rather than costs (A648-9). Furthermore, if conservation measures precipitously imposed might have net costs, they do not when imposed gradually, giving people time to adjust (A690). And, the PDOD's analysis does not take into account that OCS oil is a finite resource, and that there are national benefits to saving it for future generations and contingencies.

The PDOD's analysis was incorrect not only in its misconception of the conservation alternative, but also in its analysis of the purported benefits of OCS leasing. The premise underlying that analysis is that "the production costs of OCS oil range from \$1 to \$7 per barrel" (A956), which is less than the price of imported oil, and that the entire difference between the cost and price is paid to the Federal Government in the form of bonuses or royalties (A911, 913). There are several problems, however, with this

cost-benefit analysis. For one thing, the production cost of \$1 - \$7 is very questionable. In commenting on the Programmatic PDOD, the Director of the USGS pointed out that due to inflation the correct production cost figure in 1974 could be \$12.84 per barrel -- a figure about equal to the imported price of oil (A1354). If that figure is correct, there would be no benefits to OCS production under the PDOD's own approach.

In addition, it is significant that the U.S. consumer would be unlikely to enjoy cheaper oil prices as a result of OCS production. As Interior's former Assistant Secretary Hughes testified, even if it cost less to produce, OCS oil would sell at the world (OPEC) price of about \$12 per barrel (A912). In approving the program, however, the Acting Secretary misunderstood this point, believing that the oil price to Americans would drop (A891).

Moreover, the PDOD assumed that the entire difference between cost and price would go to the U.S. Treasury in the form of bonuses and royalties. Unfortunately, there is no basis for that assumption (Tr.1479-84), and it is quite possible that the oil companies would retain much of

it in addition to the 6-10% profit already built in to the cost figure (A915). So once again, the alleged benefits of the program are less than those set forth in the Programmatic PDOD on which the Secretary relied.

In sum, the Secretary's actions were not based upon the type of consideration required by NEPA. To the extent that adoption of the National Program was not considered adequately, Lease Sale 40 constitutes a violation of NEPA.

H. The Decision to Hold Sale 40
Violated The Substantive Mandates
Of NEPA.

In addition to failing to fulfill the impact statement requirements and to consider adequately the environmental impacts of, and alternatives to, Lease Sale 40, the Secretary has compounded his violations of NEPA by making decisions that fly in the face of NEPA's substantive mandates.

Section 102 (1) of the Act provides that:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter..." 42 U.S.C. § 4332 (1) (emphasis added).

Section 101 (b) of the Act, 42 U.S.C. § 4331(b), directs the Federal Government to improve and coordinate Federal plans, functions, programs and resources so that the nation may, inter alia:

(a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) assure for all Americans safe, healthful, productive, and esthetically pleasing surroundings;

(c) obtain the beneficial use of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences;

(d) preserve important natural aspects of our national heritage; and

(e) enhance the quality of renewable resources and approach the maximum obtainable recycling of depletable resources.

In deciding whether the Secretary complied with the Act, therefore, it is not enough to ask whether adequate impact studies and statements were done and whether they were adequately considered. Even if these requirements had been met, and they were not, the Secretary's decision would be defective if it did not conform to the Act's policies.

As the Tenth Circuit has concluded:

"Reading the Act and its legislative history together, there is little doubt that Congress intended all agencies under their authority to follow the substantive and procedural mandates of NEPA." Davis v. Morton, 469 F. 2d 593, 596 (10th Cir., 1972). (Emphasis supplied).

(See also the authorities cited by the district court, A 78-80).

Indeed, this Circuit in the recent decision in Natural Resources Defense Council v. NRC, supra, emphasized that an agency must not allow other public interest concerns to outweigh environmental concerns. Id. at 3932, fn. 13.

It is submitted that the Secretary's decision to hold Sale 40, as constituted, violated this substantive duty, in view of the known harms which oil and gas drilling could cause, including massive oil spills (see A 267-271), and the many uncertainties regarding additional possible harms both onshore and to the marine environment. At the very least, a decision should have been put off until the effects of hydrocarbons and heavy metals were better known, as were the effects of chronic pollution and the manner in which oil spills travel.

Moreover, there are many alternatives to the proposed action which should have been preferred to the course chosen. For example, at the very least, the Secretary

should have separated the exploration stage from the production stage, so as to permit a more realistic assessment of impacts once the extent of the OCS resources is known (A 266-294).

Moreover, because of the many uncertainties, and since biological testing did not play a role in the decision-making process (A 478), the Secretary should have inserted in the leases a clause allowing him to terminate should future information indicate harms to the environment. And, in light of the severe potential impacts of OCS activities and the virtual impossibility of cleaning up oil spills in the Mid-Atlantic, the Secretary at a minimum should have required that the best available technology be used.

In addition, the conservation alternative is one that should have been adopted, with the Secretary making recommendations to the President and Congress to implement it. In their inadequate treatments of it, both the programmatic EIS (Vol. II, pp. 295-300) and the Sale 40 EIS (Vol. II, pp. 533-536) recognized that conservation is beneficial. It would preserve our resources for the future while avoiding pollution and on-shore disruptions, and, even without OCS drilling, would enable the nation to meet President Ford's energy self-sufficiency goal. (A. 645-7). The Secretary, however, chose instead an option that violated his duties under substantive NEPA.

I. Sale 40 Violated The Secretary's
Fiduciary Obligations Under The
OCS Lands Act.

The Outer Continental Shelf Lands Act declares that the defendant has the responsibility to prescribe and amend necessary regulations to prevent waste and conserve the natural resources of the OCS, including without limitation the marine animal and plant life of the OCS, as well as the oil and gas. 43 U.S.C. §§ 1334, 1301(e).*

Section 3301.4 of the Title 43 of the Code of Federal Regulations, adopted pursuant to the Outer Continental Shelf Lands Act, provides that the Department shall develop special leasing stipulations and conditions when necessary to protect the environment and all other resources.

Section 3301.4 of Title 43 of the Code of Federal Regulations also provides, inter alia, that, prior to leasing, the Department shall evaluate fully the potential effect of leasing on the total environment, aquatic resources, aesthetics, recreation, and other resources in the entire area during exploration, development and operational phases and shall consider the views and recommendations of appropriate Federal agencies.

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* The United States also has the duty under international law to enact rules to protect the ocean from pollution resulting from exploration of the OCS under its jurisdiction. See Article 5 (1, and (7) of convention on the continental shelf, April 28, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578; Teclaff, International Law and Protection of the Oceans from Pollution in 40 Fordham L. Rev. 529, 558-559 (1971-1972).

The Ninth Circuit in Gulf Oil v. Morton, supra at 146, declared: "As we construe the OCS Act and NEPA, the Secretary has a continuing duty to guard all the resources of the outer Continental Shelf." It emphasized that the resources included the animal and plant life, as well as oil and gas of the OCS. Id. at 145. In Union Oil Co. v. Morton, supra at 749, the Ninth Circuit emphasized: "The Secretary is responsible for conserving marine life, recreation potential and aesthetic values, as well as reserves of gas and oil."

Indeed, the Interior Department claims that the protection of the marine and coastal environment and the orderly development of marine mineral resources are two of its major goals (Sale 40 EIS, Vol. 1, p.4).

The Secretary's failure to adequately consider the environmental impacts of, and the alternatives to, Sale 40 as indicated above, constitutes a violation of his duties under the OCS Lands Act, as well as under NEPA. Moreover, to the extent that the Secretary's decision to hold the Sale 40 violated the substantive mandates of NEPA, those actions violated his obligations under the OCS Lands Act as well.

Moreover, Dr. Atkinson pointed out that the present leasing system, under which the Government does not explore before leasing, militates against the orderly development of the oil and gas resources (A 662-663; 669-673; Tr.1464-1465). In particular, he emphasized that the failure of the Government to explore before leasing deprives of it an ability to properly spread out our oil and gas resources over the period of transition to non-conventional energy sources and to adequately evaluate the environmental risks of development (A669-670).

J. Sale 40 Violated The Obligation To
Obtain Fair Market Value For OCS Oil And
Gas Under 31 U.S.C. § 483a.

Section 483a of Title 31 of the United States Code and Circular No. A-25 of the Bureau of the Budget (September 23, 1959) require that the Secretary, in granting leases regarding OCS resources, must obtain the fair market value for such leases. The Secretary concedes that fair market value must be obtained (Sale 40 EIS, Vol. I, pp. 4-5).

The "basic unreliability" of the Interior Department's pre-sale evaluations of OCS lease tracts has been recognized. Exxon Co., et al., 15 Interior Board of Land Appeals 345, 348 (1975) (concurring opinion of Administrative Judge Fishman).

As Dr. Atkinson has pointed out, the failure of the Government to explore before leasing militates against obtaining fair market value (A 664-668). He pointed out that the reduction of risk as a result of Government exploration would increase bids both directly and by increasing the level of bidding competition (A 664-665).

III. APPELLEES HAVE SHOWN THAT THEY ARE ENTITLED TO
INJUNCTIVE RELIEF.

The general test for preliminary injunctive relief in this Circuit was set forth in Sonesta International Hotels Corp. v. Wellington Associates, 483 F. 2d 247, 250 (2d Cir. 1973):

"The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."
(Citations omitted; emphasis in original.)

See also Triebwasser & Katz v. American Telephone & Telegraph Co., 535 F. 2d 1356, 1358 (2d Cir. 1976). Under this general test the issue of the balancing of the hardships arises only when plaintiff fails to show probable success on the merits but nevertheless shows "serious questions."

The State maintains that plaintiffs demonstrated below the probability of success on the merits and, therefore, there is no need to balance the hardships which is in any event inappropriate in a NEPA case. Moreover, even if a balancing test is used, the balance tips decidedly in plaintiffs' favor.

An order granting a preliminary injunction must be affirmed on appeal unless there was an abuse of discretion or clear mistake of law. See, e.g., 414 Theater Corp. v. Murphy, 499 F. 2d 1155 (2d Cir. 1974). NOIA apparently concedes that this is the general rule (Brief, pp. 20-21), but argues that the order below, unlike most preliminary injunction orders, "bears all the indicia of a final judgment". This is incorrect, however. The district court said during the hearing: "This is not a full trial. It's a trial with respect to a preliminary order made under circumstances which do not permit the Court to hold complete and full hearings" (Tr. 1884). It granted a preliminary injunction "pending the decision on applications for a permanent injunction" (A 88), thus demonstrating that the order is precisely the sort which should not be lightly disturbed on appeal. Since it was well within the district court's discretion and not mistaken as a matter of law, it should be affirmed.

In all but a few extraordinary cases, where NEPA was violated the courts have enjoined the actions in question until NEPA is complied with. See, Anderson, NEPA in the Courts 239 (1973); Comment, 50 Iowa Law Rev. 362, 366, 373 (1974).

As to NEPA's procedural requirements, there is a substantial body of law which holds that the violation of the NEPA itself constitutes sufficient irreparable harm to require issuance of a preliminary injunction. This harm lies in the simple fact that, without the injunction, major federal action significantly affecting the environment will continue without prior compliance with the careful and informed decision-making process required by NEPA. See, Scherr v. Volpe, 466 F. 2d 1027, 1034 (7th Cir. 1972); Environmental Defense Fund v. TVA, 468 F. 2d 1164, 1184 (6th Cir. 1972); Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287, 295 (D. D.C. 1971).

However, under any standard of harm, as shown in the course of the above discussion of environmental and socio-economic impacts of Sale 40, plaintiffs have demonstrated more than the required possible irreparable harm. The leases granted under Sale 40 will authorize the oil company lessees to explore and, "after approval of details of their plans, [to] produce any oil or gas they find" (A 13). Thus, the potential harm to plaintiffs from the proposed sale would include all of the harm which could accrue throughout the 25-30 years that exploration and production is likely to continue, including oil spills, destruction of fish resources and wetlands, and onshore impacts if OCS-related facilities are permitted onshore.

Oil spills, of course, represent a most serious threat. A major oil spill, if it impacts beach areas on Long Island during the summer months, could result in weekly economic losses of \$10 million in tourist spending and jeopardize 6,000 tourist-related jobs while depriving thousands of people of essential recreational facilities (A 373-4).

Oil spills could also be very destructive to commercial and sport fishing, by mass destruction of fish and damage to tidal wetlands, on which the fisheries depend for food. As NOIA's witness conceded, there is no question but that an oil spill would kill those fish that come in contact with it (A 716). And Dr. Teal testified at length about the potential damage to wetlands from a major spill, including the wholesale destruction of the animals and plants during the spill and for years afterward with respect to some organisms--with recovery not coming for perhaps 10 years or more (A 267-271). Apart from major oil spills, smaller spills can be expected daily. The Government's witness testified that there are 250 to 300 spills per month in the Gulf of Mexico area (A 808), and it is evident that Gulf fish are tainted with oil (A 739-40). Since the entire Sale 40 area is of critical importance for fishing, the economic and environmental risks are great.

And, fisheries are resources which will renew themselves and continue in perpetuity if not disturbed. Oil and gas resources, by contrast, will be depleted in a matter of years.

As the District Court found:

"The environmental implications of production of off-shore oil are substantial. For example, the Northeast Atlantic fisheries, under effective management, can produce about 1 billion dollars worth of food and other products each year; oil spills and other pollution associated with drilling may affect the spawning and life cycles of the prevalent species. Beautiful swimming and boating areas used by million of people may be impacted by oil spills. Recent closing of beaches on Long Island because of pollution has sharply reinforced our appreciation of the costs in millions of dollars and loss of pleasure that such pollution may entail. Scarce wetlands and other land may be required for the oil pipelines and other needs associated with production of petroleum and attendant refinery and petrochemical industries." (A 16-17) (emphasis added)

*

*

"Because of the barrier islands like Fire Island lying along the Northeast coast, bays like Great South Bay in Long Island, deep wetlands and beaches such as those in New Jersey's Cape May County and huge estuaries with their many bays and inlets such as those leading from the Baltimore and Hudson canyons in the OCS, the area involved is of enormous size and importance. Millions of people reside, work and play within its bounds; much of the nurseries of

the Atlantic fisheries are located there; its destruction or serious damaging would result in loss of economic and aesthetic values at least comparable to the value of the Atlantic OCS hydrocarbon resources."
(A 47) (emphasis added).

The District Court also recognized "the substantial environmental impact that a pipeline and oil spillage from a pipeline may have on coastal lands," and said: "Uncontroverted evidence indicated that a million barrel) sic; should be gallon] spill was possible before automatic shut-off equipment took effect." (A 65; see A 223-5).

In addition, substantial onshore impacts would result, beginning from the time oil or gas is found. As the Court below found:

" . . . once a strike is made many of the corollary activities will begin, regardless of whether or not the states or federal government have approved production plans. These include siting, construction and operation of platform yards, pipe coating plants and other installations, and land acquisition for new or expanded refineries."
(A 84)

Moreover, the District Court found that there would be "land use and socio-economic disruptions . . . that would probably result from the magnitude and compressed timing of the impacts" (A 55). Among the disruptions cited in the opinion are industrial development in the coastal zone, land speculation and skyrocketing prices of land, and shortages of housing,

labor, harbor berths and equipment (A 55-57).

Plaintiffs would be harmed by exploration activity as well as production. In fact, exploratory drilling "is one of the most hazardous steps in developing offshore oil and gas" because of the possibility of a blowout, which could result in large oil spills (A 1377, a portion of CEO's Report to the President on Environmental Effects of OCS Oil and Gas Development). The fact that exploration plans must be submitted to the Interior Department for approval is no comfort to the plaintiffs since Lease Stipulation No. 7 only gives states the right to comment upon the plan (A 1092). Approval of the states is not required. Moreover, even before exploration plans are submitted, actions under those leases will constitute further commitments of resources, which should not be made prior to compliance with NEPA and the other laws. See, e.g. Calvert Cliffs' Coordinating Committee v. AEC, 449 F. 2d 1109, 1128 (D.C. 1971).

Indeed, plaintiff maintains that the leases themselves constitute irreparable harm and a prohibited commitment of resources. The oil lease was so regarded and an injunction

issued in NRDC v. Morton, 337 F. Supp. 165, 166-167 (D.D.C. 1971), aff'd, 458 F. 2d 827 (D.C. Cir. 1972). Licenses were so regarded as constituting a prohibited commitment of resources in NRDC v. NRC, supra, at 3935-3936. There this Circuit reversed a Nuclear Regulatory Commission ("NRC") order to the extent that it allowed the granting of interim licenses for the commercial utilization of plutonium and uranium mixed oxide fuel in light water nuclear power reactors and for related nuclear fuel recycle activities. Accord, Izaak Walton League of America v. Schlesinger, supra. The Court did so because an adequate environmental statement fully addressing alternatives to plutonium recycle and the special problems of theft, diversion and sabotage had not been prepared. Federal Power Commission licensing of the construction and operation of a pumped storage hydro-electric project has also been regarded as a commitment of resources. Scenic Hudson Preservation Conference v. FPC, 453 F. 2d 463 (2d Cir., 1971), cert. den. 407 U.S. 926 (1972). Plaintiff respectfully submits that this Court should affirm the preliminary injunction and declare the leases granted pursuant to Sale 40 null and void.*

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*This Court has the power now to declare the leases void, as was indicated by Justice Marshall (A 217) and by this Court at the argument on the motion to stay the preliminary injunction. Of course, OCS leases are void if they are made in violation of law. In any event, litigation asserting the illegality of Sale 40 was pending when the sale took place and the leases were granted. Moreover, this Court at the argument on the motion noted that prospective bidders obviously were aware of the pending litigation and would take leases subject to the outcome of the litigation.

With regard to the question of the balancing of harm, this Circuit has recently cited and approved the position of the D.C. Circuit that such balancing is inappropriate in NEPA cases. It stated:

"It is undisputable that the motives of the Commission, to develop new sources of energy and to recycle dwindling uranium reserves, are highly commendable; however, those national needs cannot outweigh the far-reaching national concerns embodied in NEPA. 'Considerations of administrative difficulty, delay or economic cost will not suffice to strip [NEPA] of its fundamental importance.' Calvert Cliffs *supra*, 449 F. 2d at 1115." Natural Resources Defense Council v. Nuclear Regulatory Commission, *supra*, at 3937.

Even if balancing were necessary, the burden would be upon the party arguing that non-compliance with NEPA should be excused. I-291 Why? Association v. Burns, 6 E.R.C. 1275, 1304 (D. Conn. 1974). That court also held that a preliminary injunction should issue because of a NEPA violation even though it would result in considerable expense and perhaps the loss of jobs.

A preliminary injunction pending final judgment would last a short time and is unlikely to have any dire employment or other effects on the public. If there is an effect it will be on the private interests represented by the oil industry, interests not protected by any of the statutes here at issue. Such interests should not be allowed

to outweigh the interests protected by NEPA and the other statutes relied upon. Moreover, most of the preparation by the oil industry for this sale was done speculatively prior to the Secretary's June 1976 announcement of his decision to hold the sale. Those investments would not have given the oil companies a basis to complain had the Secretary decided against the sale, and are of no consequence now. As to the possible loss of jobs, it appears that most of jobs to be created by OCS production would go to skilled people from other regions rather than to local residents (See Sale 40 EIS, Vol. II, p. 238).*

In any event, the appropriateness of injunctive relief to prevent implementation of important Federal programs in violation of NEPA is well established. Indeed, it has been recently granted by this Court even to block development of new sources of energy, NRDC v. NRC, supra, and to bar action by the U.S. Navy in connection with the national defense, NRDC v. Callaway, supra. An OCS sale itself has been blocked because of the Secretary's failure to comply with NEPA notwithstanding that it was said that there was a national energy crisis and

*The Secretary's contention (brief, p. 24 fn) that a panel of this Court already found plaintiffs' failure to establish irreparable harm is absurd. Had it so found the panel would have reversed the district court rather than set the case down for an accelerated appeal. The panel at argument said only that no irreparable harm would be suffered by plaintiffs prior to argument of the appeal, at which time the leases could be invalidated by the Court.

notwithstanding that the sale was responsive to a directive of the President. NRDC v. Morton, supra at 829-30, 835; Accord, People of Enewetak v. Laird, 353 F. Supp. 811 (D. Hawaii 1973). The preliminary injunction granted by Judge Weinstein is certainly no less appropriate.

CONCLUSION

THE ORDER BELOW SHOULD BE AFFIRMED,
WITH COSTS, AND LEASE SALE 40 AND
ANY LEASES GRANTED PURSUANT TO IT
SHOULD BE DECLARED NULL AND VOID.

Dated: New York, New York
September 23, 1976

Respectfully submitted,

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JOSEPH J. ZEDROSSER, being duly sworn, deposes and says that he is an Assistant Attorney General in the office of the Attorney General of the State of New York, attorney for Appellee State of New York herein. On the 24th day of September, 1976, he served the annexed brief upon the following named persons:

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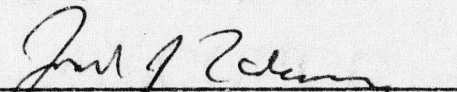
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